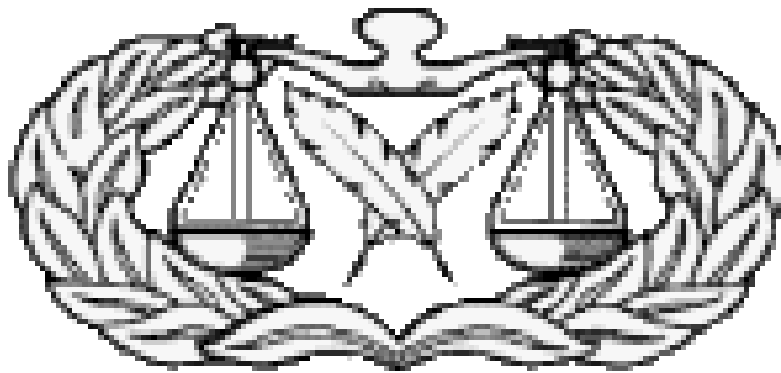


DEPARTMENT OF THE AIR FORCE PACIFIC AIR FORCES

Divorce, Military Benefits, and the Uniform Former Spouses' Protection Act



**374th Airlift Wing
Office of the Staff Judge Advocate
Yokota Air Base Japan**

PREFACE

This handout is for general guidance only. It is not meant to be a substitute for legal advice and it cannot be cited as legal authority. Before taking action on a divorce, you should consult an attorney for guidance. As the issues in this pamphlet are unique to the military, you will probably want to provide your private attorney with a copy of this pamphlet.

INTRODUCTION

In the same way that marriage legally unites individuals, divorce, annulment, and legal separation legally divide them and with the division of the marital bond comes the division of property. For military members and their spouses, entitlement to military benefits and retirement pay are often important issues. This handout outlines entitlement to benefits and retired pay for military members and their former spouses.

BACKGROUND

Until the early 1980s, military retirement benefits generally were regarded as the sole property of the military member. The landmark case of *McCarty v. McCarty*, 453 U.S. 210 (June 5, 1981) seemed to settle the matter, holding that retired pay was nondivisible as marital property. In other words, divorce courts could not divide the pay and award part of it to spouses.

In response to *McCarty*, Congress enacted the Uniformed Services Former Spouses' Protection Act (FSPA), effective February 1, 1983, making retired military pay divisible in divorce proceedings. FSPA also makes medical care, commissary and exchange privileges, and a Survivor Benefit Plan, available to spouses meeting certain requirements. (Public Law 97-252, Section 1002, 10 U.S.C 1408).

BASIC EXPLANATION

The FSPA does not mandate an automatic splitting of retired pay and benefits nor does it provide any specific formula. It does not require allocation of pay; it allows it. The FSPA allows judges in state domestic relations courts to view "disposable retired pay" as an investment resulting from the efforts of both the military member and spouse. The judge can consider "disposable retired pay" and benefits to which a former spouse is entitled under the Act, along with other property of the marriage, in making a fair settlement between the parties.

THE STATE COURTS

For the most part, domestic relations matters are controlled by state law and the rulings of state courts. It is only in those few instances where Congress has enacted a federal law governing some aspects of a divorce that states are obligated to follow federal mandates. As a federal law, the FSPA controls some important aspects of dividing military retirement benefits. Apart from that, almost all of the activities involving divorce, dissolution of marriage, annulment, legal separation, alimony, child support and custody are controlled by state law.

STATE COURT JURISDICTION

In order for a state court to take any action in a case, it must first have “jurisdiction”, which means the power to rule. For the most part, a state court has jurisdiction over its own residents. Many states have special residency provisions for military members and dependents stationed within the state.

While each state has its own residency requirements, the Soldiers’ and Sailors’ Civil Relief Act of 1940 (SSCRA), as amended is another federal law, provides that military members neither gain nor lose state residency by PCS moves. This means that their physical presence within a state does not necessarily give rise to jurisdiction in the state where the member is stationed. A state court will have jurisdiction in a particular case if the member voluntarily takes action to become a legal resident of the state or if the member consents to the jurisdiction of the court. A court may also have jurisdiction to determine part, but not all, of the issues arising in a divorce action. For example, a court may exercise its jurisdiction to terminate the marriage by issuing a divorce decree, but also determine that it does not have jurisdiction over the member’s retirement pay and therefore make no direction for the division of the member’s retirement as a part of the property settlement. This is one example of why parties to a divorce should obtain legal advice prior to taking action in a divorce.

DIRECT PAYMENTS

The Act also facilitates enforcement of property settlements by allowing former spouses to receive a court-ordered division of retired pay, alimony, and child support directly from the Defense Finance and Accounting Service (DFAS) Centers. To be entitled to direct payments of the property settlement from DFAS, the former spouse’s marriage to the military member must have lasted for 10 years or more during the same time the military member served 10 or more years toward retirement. (The 10-year threshold is not a prerequisite for direct payments of alimony or child support.) The amount which can be directly paid under the FSPA is generally limited to 50 percent of “disposable retired pay”. Thus the “10 year rule” only applies to direct payments from DFAS. Therefore, a state court order the division of a military member’s pension even if they had been married for only a few years. The result will be that the military retiree will have to send a portion of his/her pension to the former spouse.

In addition, the FSPA has its own jurisdictional requirements which must be met before a former spouse can enforce his or her entitlement through direct payment from the military services. Jurisdictional requirements under the FSPA include the member’s residence within the territorial jurisdiction of the court (other than because of military service), domicile within the territorial jurisdiction of the court, or the member’s consent to the jurisdiction of the court. **Also, DFAS will only issue direct payments in accordance with a divorce decree issued by a court within the U.S., one of its territories, or possessions. Therefore, DFAS will not recognize a Japanese divorce decree for the purpose of making direct payments.**

Other Factors Affecting the Payment of Benefits From DFAS:

Normally, payment will begin within 90 days after “effective service”. If the member is not yet entitled to retired pay, payments will normally begin within 90 days after the member is entitled.

A court cannot order a service member to apply for retirement in order to initiate payment.

Arrears will not be considered in determining the amount payable from retired pay.

An award of retired pay to a spouse or former spouse cannot be sold, assigned, transferred, or otherwise disposed of (including through inheritance) by a spouse or former spouse. [See 10 U.S.C. 1408©(2) and 32 C.F.R. Section 63.6(h)(11).]

If the member is on active duty at the time of the court order, payments will only be made if the court order (or some other ancillary documents) certifies compliance with the Soldiers; and Sailors' Civil Relief Act. [See 10 U.S.C. 1408(b)(1)(D) and 32 C.F.R. Section 63.6©(4).]

There are three ways that direct payments terminate: by court order; by death of the former spouse, or by death of the service member.

1990 AMENDMENTS TO THE FSPA

Among other changes to the FSPA, Public Law 101-510, Section 555 significantly restricted the modification of certain Court Decrees, and provided a new definition of "Disposable Retired Pay". These changes are described below.

A) Modification of Court Decrees

In determining the effect of the 1990 Amendment to any particular case, the important date to remember is 25 June 1981. Certain provisions within the court order will then determine whether or not modifications can be made.

Decrees effective before 25 June 1981 can not be modified to direct division of a member's military pension unless one of the following was included in the original decree:

- 1) a division of retired military pay, or
- 2) a reservation of the spouses' right to divide retired pay, stated in the decree.

In cases of court decrees entered on or after 25 June 1981, neither of the above requirements apply, and any modifications made concerning payment of a member's retirement will be given effect.

B) "Disposable Retired Pay"

The FSPA allows state courts to divide "disposable retired pay" as a division of marital property, which is a net amount calculated by taking the entire military retired pay and then subtracting authorized deductions.

Prior to the 1990 amendments, the most frequently applied authorized deductions included: amounts owed to the United States; amounts waived in order to receive Veterans' Administration compensation or pensions; premiums for a Survivor Benefit Plan established only for the former spouse; and amounts waived in order to receive compensation under Title 5 or Title 38. State and

federal income tax withholdings under Title 26 were authorized deductions (to the extent that they are consistent with the retiree's tax liability).

As a result of the 1990 Amendments to the Act, for divorces finalized on or after 3 February 1991, state and federal income taxes are not authorized deduction sin arriving at disposable retired pay. To illustrate this, consider a divorce decree entered before 3 February 1991 where the judge awarded a 50/50 split to retiree and spouse of a \$1,000 monthly military retirement paycheck. Tax withholdings (\$200, for example) are subtracted from the gross amount, leaving \$800 to be equally divided: \$400 to the retiree and \$400 to the spouse. However, the retiree's 1099-R showed his taxable wages to be the full amount of pay entitlement (\$1000), notwithstanding the direct payment to the former spouse. The burden was then on the retiree to prove to the satisfaction of the IRS that the former spouse should be taxed on the amount of the retired pay received by her pursuant to the court order. The subsequent tax liability for the amount of retired pay sent directly to the former spouse was largely dependent upon the characterization of the payment according to the court order awarding the entitlement.

For divorce decrees entered on or after 3 February 1991, tax withholdings will not be deducted prior to computing "disposable retired pay", therefore the division will be based on "before tax" dollars. Taxes will still be withheld, but after the pay has been divided between the retiree and the former spouse. Looking again at our example, the \$1,000 monthly paycheck will be divided 50/50, with \$500 allotted to the retiree and \$500 to the former spouse. Now, taxes will be withheld from each \$500 payment. The DFAS centers will then send separate Form 1099-Rs to the retiree and the former spouse, showing for each the amount of retired pay received and amounts withheld for taxes.

PROCEDURE TO EFFECT SERVICE

Once a court order divides the retired pay, the order needs to be properly served upon the member's finance center to be implemented. A signed application submitted to the DFAS by the spouse/former spouse or attorney is required to effect the apportionment of a service member's pay or for child support or alimony. DFAS will not honor orders"

1. Which are not explicit as to what is being awarded (e.g., division of retired pay, alimony, child support);
2. Conditional awards which contain the word "if";
3. Awards which provide for fixed costs with cost of living adjustments or for offsets against the amount to be paid.

DD For 2293 contains the required information, including the following:

- a. The full name, address and social security number of the applicant.
- b. The service members' full name, social security number and branch of service.
- c. A written statement certifying that no modification to the court order has been effected, and no appeal will be taken by the applicant.
- d. A written statement that any future overpayments are recoverable and subject to involuntary collection from the applicant or his or her estate.

- e. A written statement that the applicant will notify DFAS if the court order upon which payment is based is vacated, modified or set aside. (This includes notice of remarriages if all or part of the payment is for alimony or notice of a change in the eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay).

In addition, the following must be submitted:

1. A certified copy of the court order which awards an apportionment of the retired pay to a spouse or former spouse, (as well as a certified copy of the divorce decree if not the same order). Orders must be certified by the issuing court within 90 days of their receipt by DFAS.
2. If the member was on active duty when the court orders were entered, the court order or other documents must show compliance with the SSCRA.
3. Proof of the date of marriage (unless it is shown in the court order).
4. The order must provide for payment of: (a) an amount expressed in dollars; (b) an amount expressed as a percentage or fraction of disposable retired/retainer pay; or © if the parties were divorced while the military member was on active duty, either an amount to be derived from a formula, or a hypothetical retired pay amount, as set forth below. (Methods (a) and (b) are also available to parties divorced while the military member was still on active duty).

In order the DFAS to accept a formula, the missing element must be either the military member's years of service or the total retirement points earned by a reservist. The formula would be states as follows:

(a) Active duty personnel:

$$50\% * \frac{\text{Total \# of months married during military service}}{M} \times \frac{\text{Retired Pay of Reservist at Retired or Given Grade}}$$

(*other appropriate percentage)

M = Total # of Months of Creditable Military Service Upon Retirement

(b) Reserve Personnel:

$$50\% * \frac{\text{Total \# of Retirement Points earned during marriage}}{M} \times \frac{\text{Retired Pay of Reservist at Retired or Given Grade}}$$

(* or other appropriate percentage)

M = Total # of Retirement Points earned during Military Service

NOTE: If you elect a “given grade”, rather than the “retired grade” as part of the formula (most likely if the parties are divorced while the military member is on active duty), you will need to be certain that your divorce decree has the following language: “...as well as the same percentage of cost-of-living increases.”

Documents must be served by personal service, or by registered or certified mail, to the following address. Note that DFAS-CL is the only designated agent within DoD for receipt of court orders involving FSPA payments against members and retirees from those branches of service. Service upon any other DoD organization will not be effective.

DFAS-CL/(Code LF), P.O. Box 998002, CLEVELAND, OH 44199-8002

THE SURVIVOR BENEFIT PLAN

The 1986 Department of Defense Authorization Act (PL 99-145), effective March 1, 1986, changed the basic structure of the Survivor Benefit Plan (SBP). A military member retiring after March 1, 1986 will be enrolled automatically in the SBP with full coverage of his spouse as beneficiary unless both the member and the spouse agree in writing to elect less than full coverage or coverage for a child only. Under the previous system, the spouse was notified of the member's decision by the spouse's consent was not required. If at the time of retirement the member has no spouse, he or she may elect coverage for a child or for another person in the insurable interest category. The member and spouse together may elect less than the gross retired pay as the “base amount” upon which payments and benefits will be calculated. The minimum base amount that may be selected is \$300.

The beneficiary will receive 55% of the base amount until age 62; after age 62, the amount will drop to 35% of the base amount selected. There will be no social security offset as there was in the previous system. Those who were enrolled in the plan before March 1, 1986, are grandfathered into the older system. When the member dies, the beneficiary will receive payments under the new system or the old social security offset, whichever is most advantageous. Benefits will be discontinued if the survivor remarries before age 55. However, if the second marriage ends because of death or divorce, payments to the survivor will be resumed.

When a retiree who has already enrolled in the SBP (with a spouse as beneficiary) is divorced, he or she is obligated to notify the appropriate Finance Center. Coverage for the former spouse will cease and any payments made since the divorce will be refunded. If the divorced retiree dies without having remarried, no one will receive the benefits. If he remarries, the new spouse will be covered automatically after one year of marriage.

However, at the time of the divorce, the retiree may elect to continue coverage for his former spouse (or former spouse and minor child/children) if the spouse was a beneficiary prior to the divorce. An active duty member may agree at the time of divorce to name his ex-spouse as beneficiary of the SBP when he retires. If election is voluntary on the part of the member or retiree, there must be a written, notarized agreement signed by both the member and the spouse and it should be incorporated into the divorce decree and property settlement. The decision can be revoked only by a new court order. For active duty or retired members, application for the reinstatement of a former spouse must be made to the appropriate Finance Center within one year of the date of divorce.

A court can require a military member or retiree to elect the SBP for a former spouse or for both a former spouse and child. A court can also require a retired military member who has SBP coverage to convert that coverage to former spouse coverage upon divorce. The former spouse should ensure the court ordered election is made by filing with DFAS a request within one year of the date of the divorce.

TAX TREATMENT—DIVORCES GENERALLY

The tax treatment of payments pursuant to a divorce or separation agreement depends on how they are characterized. Alimony or separate maintenance payments are treated differently than child support payments. Division of property pursuant to a divorce decree has yet another treatment. Part of the confusion over taxation of payments of military retired pay results from its characterization both as “wages” and “property or pension”.

The tax rules on alimony and separate maintenance were changed for post-1984 divorces or legal separation agreements. This discussion covers only post-1984 actions.

1. **ALIMONY:** Separate maintenance payments are income to the payee and deductible to the payer if the following criteria are met:

The payment must be in cash or its equivalent;

The payment is received by (or on behalf of) a spouse under a divorce order or separation agreement;

The order or agreement does not designate the payment as excludable from gross income under section 71 and non-deductible under Section 215, Internal Revenue Code;

The payer and payee spouse are not members of the same household at the time of payment;

There is no liability to make any such payment for any period after the payee spouse's death nor liability for payment of cash or property as a substitute for such payment after the payee spouse's death;

The spouses must not file joint returns with each other.

To prevent property settlements being disguised as alimony or separate maintenance by “front-loading” of alimony (an income-splitting technique to allocate income to a taxpayer in a lower tax bracket), there is a special “recapture” rule for “excess” alimony payments. (See sections 71, 62(a)(10), and 215 of the Internal Revenue Code).

2. **CHILD SUPPORT PAYMENTS:** Payments treated as child support are not deductible to the payer. Although a payments might be called alimony, it will be treated as child support if the instrument calls for reducing that payment based on a contingency related to the child (e.g., attaining a certain age, dying or leaving school).

In the case of a child of divorced parents, the dependency exemption for that child generally goes to the parent having custody for the major part of the calendar year, provided over one-half of the child's support comes from parents who have divorced, legally separated, or lived apart for the last six months of that year. There are exceptions to the general rule of giving the exemption to the custodial parent, e.g., a qualifying multiple support agreement or release by the custodial parent. (See Section 152, Internal Revenue Code, and related regulations.)

If a DFAS makes a distribution to a former spouse which is considered alimony or child support, the payments should be reflected on the Form 1099-R issued to the retiree. These items would be included in the "gross income" of the retiree. As noted above, that part considered alimony would be deductible by the retiree as an adjustment to income under Section 62(a)(10) and 215 of the Internal Revenue Code. It could be included as income to the former spouse under Section 61(a)(8).

3. **PROPERTY TRANSFERS:** For property transfers between spouses or former spouses incident to a divorce, no gain or loss is recognized to the transferor. (Section 1041(a), Internal Revenue Code) The value of the property is not included in the gross income of the transferee. It is treated as a gift, with the transferee taking the same basis (usually the cost) as the transferor. "Incident to divorce" means that the transfer occurs within one year of cessation of the marriage. This non-recognition rule is not applicable if the transferee spouse is a nonresident alien. Further, a transfer to a trust where liability exceeds the basis will cause recognition of gain and a corresponding adjustment in the basis.

TAX TREATMENT—FSPA PAYMENTS

The overall discussion of a divorce-related taxation provides an overview of the tax rules applying to payments under the FSPA. The starting point for analysis in a particular case is to examine the court decree and applicable state law to see what property interests are created. Then, one looks to Federal tax law. It is well settled that Federal law controls how income from property interests will be taxed. *United States v. Mitchell*, 403 U.S. 190 (1971). The case of *Eatinger v. Commissioner*, T.C. Memo 1990-310 (1989) is particularly instructive as to FSPA payments. *Eatinger* involved a California divorce decree in which the former spouse was awarded as her sole and separate property 42 ½ percent of her former husband's military retired pay (less survivor benefit premiums and life insurance premiums on their lives). A modification of the decree required the husband to pay arrearages in past payments, less income taxes, attributable to the military "pension". The original and modified decree also provided for alimony. The petitioner (the former spouse) in the tax court proceeding reported the alimony as income but did not report the remainder of payments received. She argued that her share of her former husband's retirement was property. Because the court referred to it as retirement "income", the court rejected the argument. Whether characterized as "income" or "property", it was considered taxable to her. If considered "property", the income from property is taxed to its owner. The portion of monthly payments would be applied against her basis, and that basis being zero, the payments would represent income. The court held that her share of her former spouse's retirement pay was taxable as pension income. Gross income includes pensions. (Section 61(a)(11), Internal Revenue Code).

MILITARY BENEFITS AFTER DIVORCE

1. Spouses: Entitlement to medical care and other privileges for former spouses is based upon the duration of the marriage, the number of years in service and the number of years that the marriage overlaps with service.

In addition, all former spouses lose eligibility to medical care, both CHAMPUS and through Military Medical Treatment Facilities (MTFs), if they are enrolled in an employer-sponsored health plan, regardless of age. However, at age 65, former spouses only lose eligibility to CHAMPUS if they become eligible for Medicare, Part A. They do remain entitled to an ID card reflecting eligibility for medical care in MTFs.

Maximum “20/20/20” benefits are available to an unremarried former spouse of a member (or former member) who was married to that member for at least 20 years, and whose spouse performed at least 20 years of creditable service in determining the eligibility to retired pay, and had 20 years of marriage overlapping 20 years of creditable service.

“20/20/20” benefits are medical care in both civilian and military facilities, and commissary, theater and exchange privileges.

Limited “20/20/15” benefits are available to an unremarried former spouse of a member (or former member) who was married to that member for at least 20 years and whose spouse performed at least 20 years of creditable service in determining eligibility to retired pay; and who had at least 15 years of marriage overlapping the 20 years of creditable service.

“20/20/15” benefits are medical care in civilian and military facilities (but not commissary, theater or exchange privileges).

If the divorce occurred before April 1, 1985, an unremarried former spouse is medically covered indefinitely (provided the former spouse does not remarry and is not enrolled in an employer-sponsored health plan). If the divorce order is dated after April 1, 1985, an unremarried spouse is fully covered for medical care for one year, with an option to participate in a group insurance plan with limited coverage for one additional year. There is no coverage after two years.

If you do not qualify for medical care based on the above, you should consider purchasing health insurance through the Department of Defense’s Continued Health Care Benefit Program (CHCBP). If you are pregnant or have a pre-existing medical condition, you will probably be unable to purchase private health insurance, and therefore should carefully consider this program. As of 1995, the premium for each three month segment is \$410 for one person, and \$891 for two or more people. You can continue to purchase coverage in three month intervals up to 18 or 36 months, depending on your status. For more information, first contact your Health Benefits Advisor in the Patient Administration section of your local military treatment facility. For greater information, you should contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608, telephone 1-800-809-6119.

2. Children: (natural or adopted in accordance with American standards) continue to be entitled to military identification cards and certain military benefits after the divorce. Step-children (of the member) will not be entitled to benefits after the divorce.
 - a. Medical care: unmarried children under age 21 continue to be entitled to medical care in both civilian and MTFs. Unmarried children over 21, if enrolled full-time in an accredited institution of higher learning, remain eligible to receive medical care until graduation or age 23, whichever is earlier. Also, the sponsor must be providing over 50 percent of the child's support. The entitlements for incapacitated children are handled under special rules.
 - b. Delta Dental care: same as above, if elected by the sponsor.
 - c. Commissary: children residing in the household of a separated spouse continue to be eligible for commissary privileges until the divorce is final. Once the divorce is final, children residing in the house of a former spouse who is not authorized commissary privileges are not considered to be members of the authorized sponsor's household for purposes of commissary privileges, even if the sponsor provides or maintains the household.
 - d. BX/PX/NEX and theater: children continue to be entitled to use of the exchange and theater if they are dependent on the sponsor for over 50 percent of their support.

For further information concerning procedures for obtaining identification cards, contact the Customer Service Element in the Military Personnel Flight at the nearest military installation.

FOR FURTHER INFORMATION ON THE FORMER SPOUSES PROTECTION ACT:

1. AIR FORCE, ARMY, NAVY AND MARINE CORPS
Defense Finance & Accounting Service - Cleveland
Center Attn.: DFAS-CL/Code LF
P.O. Box 998002, Cleveland, OH 44199-2055
2. COAST GUARD
United States Coast Guard Commanding Officer (L)
Pay and Personnel Center 444 Quincy Street
Topeka, KS 66683-3591
(913) 295-2517